THE 8 TO 7 DECISION

COURTS HAVE STILL THE DUTY TO DEAL DEATH BLOWS TO FRAUD.

JUSTICE AVERY'S GREAT OPINION.

If There is no Way by Which the People can be Relieved of an Admitted Forged Law, Then Government of the People and by the People is an Egregious Failure---The First Case in History Where the Forger has Attempted the Role of Law Maker.

The 8 to 7 decision, by which Hayes was fraudulently given the Presidency, also gave protection to the thieves who stole the office.

The three to two decision of the Supreme Court of North Carolina, declaring that the arm of the law is so short that it cannot relieve the people of a forged act, will give immunity from punishment to the rascal who forged through the law.

The whole State is crying out for the punishment of the party or parties who were guilty of this piece of rascality. It is a pity that they have been shielded by a vote of 3 to 2.

The following dissenting opinion by Justice Avery, clearly shows that there not only is warrant of law for sustaining the complaint of Governor Carr, but he also makes it clear beyond question that such a construction of law as shields the criminal is inimical to the perpetuity of free institutions.

N. C. Supreme Court, Feb. term 1895. Carr vs. Coke. Avery dissenting.

The plaintiff alleges on behalf of the people of North Carolina, that a forged paper, purporting to be an enrolled bill, that had passed both Houses of the General Assembly was placed before the presiding officers of the Senate and House of Representatives, and that being misled by fraudulent misrepresentations, they were induced to attach their official signatures to it, and give to it the force and effect of a law. Upon these facts the plaintiff, as a citizen and in the name of the State, prays the court to declare that this paper which by such covinous trickery has been placed upon the files in the office of the Secretary of State, is not a part of the statute law, and to restrain that officer from furnishing it for publication among the acts of the legislature. The Judge who presided in the court below holds that admitting the paper ratified in this way to have been a forgery, the courts are powerless to remedy this great wrong, and the people can have no relief till the Legislature shall again assemble. If it be asked how this admission was made, I answer that it was made by the Judge who heard the case below, when he held, on motion of defendant's counsel, that the plaintiff was not entitled to the relief demanded upon the face of the complaint unanswered, or in other words, if there were no denial by answer of the allegation that the enrollment of the bill was procured by fraud and the signature made by mistake, the court had no authority to remedy the wrong done to the public. If authority be demanded to sustain this proposition, then I refer as the last of an indefinite line of decisions sustaining this familiar doctrine to Bank vs. Adrian, decided at this term, in which the present Chief Justice, in a very elaborate opinion, declared that when a plaintiff insisted that the answer did not state facts sufficient to constitute a defence, just as the defendant contends here, that the complaint fails to state facts constituting a cause of action, that it was a case "in which one party alleged fraud and the other admitted it."

In my opinion to admit that an adroit forger can fradulently convert his own handiwork into a statute which the courts, with full knowledge of its character must enforce as law, is to confess before the world that government of the people and by the people is an egregious failure. I am not prepared to admit that courts of equity, which have dealt death blows to fraud wherever it has reared its hydra head, for hundreds of years, must desist from unearthing and undoing such iniquity because the perpetrator attempts to take refuge in the purlieus of the temple, where a co-ordinate department of the government is in council. The arm of the law is not so shortened that it cannot right such wrong wherever done. No precincts are too sacred to be invaded by its process when such an end is in view. We cannot forget the fact that this is a case of this impression. The judicial annals of the State of this Union have been searched in vain to find a parallel for it and any argument founded upon the authorities cited is misleading in that it assumes an analogy where none exists.

As this is the first case in the history of Anglo-Saxon civilization where a forger has attempted to play the role of law-maker, it seems to me a fitting opportunity to vindicate the truth of the axiom that our system of jurisprudence affords an adequate remedy for every wrong done to a citizen, either as individual or as a representative of the public. Courts of Equity (says a leading law-writer) have been confidently resorted to in order to sift the consciences of men and trace out fraud, so that titles founded upon it might be declared void. When the plaintiff comes into court to demand this probing of the consciences of those who know the history of this admitted fraud and forgery, counsel for the defence meet him with the objection that the clause of the Constitution, which guarantees the independence of three co-ordinate branches of the State Government, is an insuperable barrier to any action on the part of the court. Section 8 of Article I of the Constitution provides that "The legislative, executive and supreme judicial powers of the State ought to be forever separate and distinct." Is it an invasion of the domain of either of the other two departments, to draw in question before the courts the validity of an instrument duly attested by the chief officers of either of them? The organic law, it will be observed, couples the Executive with the Legislative Department. Where a private citizen of North Carolina records an entry upon the entry-taker's books, containing a specific description of a tract of land, or by a survey makes an indefinite description certain, before his neighbor makes an entry of the same land, though the latter may procure an older grant signed by the Governor of the State, the courts in the exercise of their equitable jurisdiction have never hesitated, upon application of the senior enterer, to declare the older grant issued by the head of the Executive Department null and void, and to compel the junior enterer to convey the legal title to him, who has the better right, because with notice that this neighbor had expended his money for an entry of the same land the junior enterer is guilty of *fraud* in procuring the first title from the State. Johnson vs. Shelton, 4 Ired. Eq. 85; Harris vs. Ewing, 1 Dev. & Bat. 374; Currie vs. Gibson, 4 Jones Eq. 25; Munroe vs. McConnel, 6 Ired. Eq. 85; Grayson vs. English, 115 N. C. 631. Though grants for land are signed by the Chief Officer of a co-ordinate branch of the government, it has never been suggested during the century in which the courts have been setting aside these solemn patents, under the great seal of State, on the ground that they were procured by fraud, that the courts were invading the independent domain of the Governor, as the head of the Executive Department. This being a case of the first impression here, the issue must not be obscured by remote analogies, drawn from precedents not in point. If Section 8 of Article 1 of the Constitution is invoked to prevent this investigation demanded by the people through that one of their number, whom they have chosen as their Executive chief, it will be seen at a glance by layman as well as lawyer that the Constitution affords the same protection to the independence of the Executive as of the legislative and judicial departments. If it is an impenetrable shield, behind which fraud may stalk secure and mock with ghoulish glee the anger of an injured people when suit is brought to show that the signature of the two presiding officers of the two branches of the Legislature were procured by fraud, and attached by mistake to an instrument affecting the rights of the whole body of the people, how is it that it has never occurred to the long line of illustrious men, who have preceded us in this Court, that it was an invasion of the distinct power of the Executive Department to set aside its Great Seal, which above all things imports verity at home and abroad, and the signature of its chief officer, where a single citizen complains that another procured that solemn attestation in fraud of the complainant's individual rights?

The single issue of law presented by this appeal is whether a forged paper purporting to be an enrolled bill that had passed both houses, when presented to the presiding officers and signed by them under the mistaken belief that it is genuine, is open to attack for fraud like a grant signed by the Governor. The gravamen of the complaint is embodied in section 11, where it is alleged that "by some means unknown to this plaintiff but which he is informed and believes to be fraudulent, the said bill was enrolled by some person to the plaintiff unknown, in the office of the enrolling clerk and signed by mistake by the President of the Senate and Speaker of the House of Representatives upon the day upon which it purports to have been ratified."

Equity vacates a patent which the Governor signs, not by mistake but in accordance with the requirements of law, because it is procured in fraud of the superior right of a single citizen. Why, then shall the same tribunal declare itself powerless to rectify a fraud upon the rights of the whole people of the State, accomplished by imposition practiced in the most specious way, directly upon the chiefs of the two branches of the legislative department?

When the people met in convention and framed a Constitution they expressly delegated certain powers to each of the three departments, and prohibited one or all of these agencies, for the most part, in Article I, in terms quite as clear, from exercising certain other sovereign authority. The result was, that while the Legislature, as the representative of the popular will, is still clothed with the residuary power, or that which is not expressly granted to either of the other departments and that does not fall within the prohibitions mentioned, it is in the exercise of its own delegated authority, co-equal, not superior, to the other co ordinate branches, acting within the purview of their powers. All three are mere agents of the people, acting under an express power of attorney. When therefore it is provided in Section 16, Article III on the Constitution that "All grants and commissions shall be issued in the name and by authority of the State of North Carolina, sealed with the Great Seal of the State, *signed by the Governor* and countersigned by the Secretary of State," and in Section 23 Article II, that "All bills, &c., shall be signed by the presiding officers of the two houses," the one clause is hedged about with no more of the divinity of sovereighty than the other.

Battle, Judge, says in State vs. Glenn, 7 Jones, 323, "Our predecessors were the first of any Judges in any State in the Union, to assume and exercise the jurisdiction of deciding that a legislative enactment was forbidden by the Constitution and was therefore null and void. See Bayard vs. Singleton, Martin's (N. C.) Rep., 48, decided in November, 1789, which was four or five years anterior to the earliest case on the subject referred to by Chancellor Kent. 1 Kent's Com. 450." Since that early day this court has never hesitated to assume this authority to pronounce a statute passed by the Legislature with all of the forms of law, null and void because repugnant to the Constitution. Indeed at this term an act which had not been published in the laws, but which was regularly passed at the last session of the Legislature has been in effect declared unconstitutional, because the right of exacting more than six per cent as interest allowed therein was held to fall within the constitutional inhibition against granting special privileges.

No one questions the right of this court in a proper case to pronounce an Act, which is admitted to embody the true sentiment of the Legislature, void on the ground that it had no right to pass it, yet, if what now purports to be the statute before us had provided that the lawful rate of interest in this State should be three per cent a month, or thirty-six per annum, and its passage had been procured by speculators and note-shavers, it would nevertheless be contended, if the opinion of the court is founded upon the correct interpretation of the organic law, that the people would be placed in the dreadful dilemma of groaning under such a burden, until another General Assembly should meet, or of asking the Governor to call an extraordinary session, at a heavy expense, of the same Legislature, that according to the admissions in the pleading failed at its last session to close some of its clerk's rooms against forgery and fraud. I do not believe that the law properly intrepreted reduces us to this dire extremity.

There would be a prospect of a much more economical and satisfactory settlement of this controversy by the trial before a jury of an issue of fraud, as demanded by the plaintiff, than by inviting the same bodies with the same lobbyists lurking around them, to remedy the great wrong that the public have suffered through some agency that was, at its last session, able to reach its employes. With due deference for the views of others, I am of opinion that we ought on this question, which has been presented to us first of all the courts of America, to follow the example of our predecessors more than a century ago, and assert for the courts the power to unravel fraud, even if the tangled skein should take us behind the solemn act of ratification by presiding officers, as did the determination of the early judges to prevent violations of the sacred instrument which they had sworn to support.

The clear-cut issue of law raised by admitting the truth of the charge of fraud must not be obscured by discussing the preceding allegations in reference to a bill, in the same words, the legislative history of which is traced till it is found tabled in the house and turned over to the State Librarian, who is the custodian of bills, which are thus strangled in the earlier stages of their existence. These allegations are, at most, but an attempt to negative the idea in advance, that the forged paper had a legislative history leading up to its ratification, which the defendant might contend could not be contradicted. It does not seem to me bad pleading to have inserted these allegations, when the relief demanded was a perpetual restraining order against the defendant, although the plaintiff relied solely upon the ground that the paper presented to the presiding officers was falsely and fraudulently represented to them to be an enrolled bill and its ratification procured in that way. Counsel for the defendant cannot be allowed "to blow hot and cold" to induce the court, on motion, to hold that it cannot hear proof of the allegation of fraud, if true, and then to say by way of breaking the force of the ruling invoked that they could disprove the charges of forgery and fraud, if they would. The fact that the bill was enrolled without authority and signed by mistake, is not, for the purpose of this appeal, denied by any one. That it was fraudulently enrolled and presented for signature is alleged in the complaint, and His Honor holds that even though all this is true the court has no jurisdiction to hear evidence to show its truth.

The argument deduced from supposed future inconvenience is always the most specious and unsatisfactory kind of reasoning. To the suggestion that possible evils may ensue from sustaining the power of the courts to impeach the validity of a statute, it may be answered that the announcement that the Constitution is a shield for manufacturers of forged law, will indeed open a pandora's box, out of which will issue invitations to those who are capable of such crime to throng the lobbies of our legislative halls and make, by bribery, forgery and other fraudulent practices, the laws which should be framed to afford remedies for the grievances and protection to the rights of the people.

A free government like ours must always be dependent for its stability more upon the virtue and integrity than upon the intelligence of its citizens. As well might we insist that the statute, which allows any person in the State to make affidavit that any other person has as he is informed and believes committed murder and demand a warrant for his arrest, should be repealed because it opens a way for the arrest of every innocent man in the State, as that to permit investigation of the allegation that what purports to be a law regularly ratified is not in reality an expression of the will of the people through their representatives, but the work of a forger, would raise a doubt as to the validity of every statute passed by the legislature. Where a plaintiff asks, on behalf of the people, an order restraining the Secretary of State from publishing a ratified Act on file in his office he is required to make an oath, which if made falsely and without probable cause subject him to punishment for perjury. It is not to be supposed that such risks will be taken inconsiderately, and, if the perpetrators of this disgraceful crime could be impaled before the world and held up to public execration, it is to be hoped that another century of our country would glide by without such a flagrant instance of corrupt interference with legislation.

I understand my brethren to concede, what cannot be denied, that not one of the cases cited to sustain the opinion of the court is exactly in point here, for the reason that it has never before been charged, much less proved, that the ratification of a forged bill was fraudulently procured, when it had not in fact passed. The question raised in the cases relied upon by the majority of the court to sustain their position, was whether the journals of the two legislative houses could be used to show that an enrolled bill did not pass. No such thing is proposed by the plaintiff here. In the complaint he says that a paper purporting to be an act of the legislature was fraudulently enrolled and signed by mistake, and, an introductor to this allegation, he avers in substance that the journals not only do not contradict but tend to confirm it. A similar bill passed its first reading in the House of Representatives, was tabled on its second reading, and can now be adduced in evidence from the office of the lawful custodian of such papers. The journal of the Senate fails to show that any such bill was ever before that body. So that the record of the one body, as far as it goes, tends to corroborate, while there is no recorded history of any such bill in the journals of the other, to contradict what is relied upon by the plaintiff as the basis of his action, the fact that a forged paper, signed by the presiding officers by mistake, is now being enforced to restrict the right of the citizen, in the interest of the procurers of this monumental fraud, Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the question whether the ratification can be contradicted by the journals which will be found in the notes on pages 661-667 of volume 143, of the United States Reports, that, in twenty eight of the States, the courts have held that it is competent to impeach the ratification by the journals directly; while it is held to the contrary in but nine States. The conceded fact that in some of those States there are constitutional amendments providing that the ratification may be contradicted by the journals shows conclusively that we have no reason to fear the threatened ills which are prophesied as probable results of going behind the ratification of an act to show that it did not pass, and that its enrollment was procured by fraud, when twenty-eight States still afford good government to their citizens, after permitting the journals to be used to show not fraud, but that the ratified bill not not pass. Indeed it is worthy of special notice that the forgery of what purports to be an enrolled bill has been first attempted where the people had never been permitted to go behind the ratification and when it was hoped by the perpetrators of the fraud that their envious work would prove, as it has done, effectual. When the courts of more than three fourths of the States have ventured to go behind the ratification of statutes to call in question the regularity of the successive steps preceding the signing by presiding officers, it seems to me that we may venture, when the first attempt is made to impeach for fraud instead of irregularity, to look for an analogy to govern us rather to the views of the twenty-eight than to the opinions of the nine courts.

The position of the court, in my opinion, finds no support in the case of Broadnax vs Groome, 64 N. C. 247, where Chief Justice Pearson speaking for the court, holds that "The ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives, makes it a matter of record, which cannot be impeached before the courts *in a collateral way*." But the plaintiff is making not a collateral, but a direct attack, and the court in that opinion concedes that even a record can be successfully avoided and reversed, where it is directly attacked for fraud or irregularity. It is true that where there is a want of jurisdiction apparent upon the face of a record, it may be impeached without any direct proceeding, just as the validity of a ratified statute may be questioned for repugnance to the Constitution. Springer vs. Shavender, decided at this term. If the Constitution does not forbid, why should public policy prohibit a citizen on behalf of the whole people from impeaching a statute for fraud, when for his own protection he may attack a judgment regular upon its face. It was said obiter in Scarborough vs. Robinson, 81 N. C., 412, that the journals could not be introduced to attack the existence and validity of a statute regularly filed among the records in the office of the Secretary of State. If that doctrine is conceded to have the force of law, it in nowise affects a case where the plaintiff relies upon proving that the enrollment of the bill was procured by fraud, and where if the defendant resorts to the journals to disprove it, he finds that they tend rather to corroborate than to contradict the allegation. The opinion of the majority of the court, in the case of Cook vs. Meares, decided at this term, intimates very broadly that the opinion in Scarborough vs. Robinson ought to be overruled upon the point really involved, because it conceded to the presiding officers, if corrupt or unmindful of their duty, the power by refusing to sign, to in reality veto bills regularly passed by the representatives of the people. Should we, then, standing in a position to make a precedent for the court of America, hesitate to declare invalid an act which, we must assume, both of these officials would declare to have been done by mistake on their part, and to have been procured by fraud on the part of others?

I deeply regret that the majority of the court have deemed it their duty to hold that the courts have no power to investigate and remedy the great wrong which has been done to the public. I regret it because it gives immunity to the wrong doers in this case, and, in my judgment, encouragement to others to attempt like frauds in the future.

Sale of Valuable City Real Estate

Under and by virtue of a power of sale given in a deed of trust executed to me by William Cram and Kittie T Cram and others, which is duly registered in the office of the Register of Deeds for Wake county, in book 113, page 458, I will sell on Monday the 3rd day of June, 1895, to the highest bidder at public sale at the court house door in the city of Raleigh, the lot or parcel of land lying and being in the said city of Raleigh on the south side of Martin street and east side of Dawson street, and bounded and described as follows: Beginning at a point on the south side of said Martin street two hundred and eighty feet from the southeast corner of Martin and Dawson streets and running thence along the dividing line between the lot hereby conveyed and the lot of R. S. Tucker on the east thereof, with the paling between the lots, as it now stands, nearly south (on the west side of two holly trees, which stand about one foot from the paling) about two hundred and sixty feet to the back paling on said lot, dividing it from the lots of Thomas Brockwell, R. Dobbin and the Cottage Hotel lot, the property of the late B. F. Moore, now deceased; thence along said back paling as it now stands nearly west to Dawson street, two hundred and eighty feet thence along Dawson street nearly north about fifty-five feet to the southwest corner of the lot on Dawson street sold by the parties of the first part to William H. Cole; thence along the southern line of Cole's said lot about one hundred and twenty-seven feet nearly east to the southeast corner of Cole's lot; thence nearly north along said Cole's eastern line to the southern line of the lot of W. H. Hughes; thence nearly east along the southern line of the lot of said Hughes to the southeast corner thereof, about twelve feet; thence nearly north along said Hughes eastern line one hundred and fifty feet to said Martin street; thence nearly east along the south side of Martin street to the beginning.

Time of sale 12 o'clock noon. Terms cash.

S S BATCHELOR,
Trustee.

PROPOSALS.

Sealed proposals, indorsed "proposal for constructing and completing the new annex to the Eastern Asylum, Goldsboro, N. C.," will be received by the Building Committee until 12 o'clock a. m., June 1st, 1895, and opened thereafter. Plans and specifications can be seen at the Asylum, and at the office of the Architect, A. G. Bauer, Raleigh, N. C. Bidders are expected to fully inform themselves of the character of the work required, and the successful bidder must furnish a responsible bond of $5,000 for the faithful performance of the contract. The right is reserved to reject any and all bids.

DR. J. F. MILLER, SUPT.

Dissolution of Co partnership.

The firm of Yancey & Martin, for the manufacture of carriages, etc, and the livery business, is this day dissolved by mutual consent. The livery business will be conducted by E. M. Martin, the carriage business will be conducted by T B. Yancey.

Persons indebted in livery account will settle with E. M. Martin, and those indebted to the firm in the shop account will settle with T B. Yancey. Persons having claims against the firm will please settle a once. This May 15th, 1895.

T. B. YANCEY,
E. M. MARTIN.

Executor's Notice.

Having this day qualified before the Superior court of Wake county, as executor of the last will and testament of Virginia McAden Baker, deceased, I hereby notify all persons having claims against the said decedent to exhibit them to me on or before the 20th day of May, 1896

ASHLEY L BAKER,
Executor

Raleigh, N C, May 18, 1895